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No. 00-353

Supreme Court, U.S.
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In The

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner,

v.

NEWTOWN TOWNSHIP AND THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the preservation of local municipal zoning authority under the Telecommunications Act permits a municipality to deny a request for a building permit not in compliance with local zoning regulations when alternative sites for construction exist in compliance with applicable local zoning regulations.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

A corporate disclosure statement is not required of Respondents pursuant to Rule 29.6 for the reason that Respondent Newtown Township (Delaware County, Pennsylvania) is a governmental corporation and Respondent Zoning Hearing Board of Newtown Township is an instrumentality thereof under Pennsylvania state law.

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COUNTER-STATEMENT OF THE CASE

Petitioner Omnipoint Communications Enterprises, L.P. ("Omnipoint") is a provider of wireless telephone services. Respondent Newtown Township ("Township") is a municipality and political subdivision in Delaware County, Pennsylvania. Respondent Zoning Hearing Board of Newtown Township ("Board") is an instrumentality of the Township under applicable state law, i.e., the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 et seq. ("MPC") created under § 10901 of the MPC to perform zoning functions and render zoning adjudications set forth in the MPC.

Respondents declined to grant a building permit requested by Omnipoint to install wireless telephone antennas and related structures atop an apartment building in the Township known as the Newtown Towers located at 3400 West Chester Pike, Newtown Square, Pennsylvania. The denial was for the reason that the Township's Zoning Ordinance clearly did not permit erection of such a structure at that location.

Omnipoint filed suit in the U.S. District Court for the Eastern District of Pennsylvania alleging, inter alia, that the denial of the building permit violated the Federal Telecommunications Act of 1996, 47 U.S.C. § 332 and the Civil Rights Act, 42 U.S.C. § 1983.

The case was submitted to Magistrate Judge Smith of the District Court on cross motions for summary judgment. There were no testimonial proceedings before him. The record included the transcripts of extensive proceedings before the Board on Omnipoint's request for the

building permit. Omnipoint's motion for summary judgment was granted except for its request for attorneys' fees under the Civil Rights Act and Magistrate Judge Smith ordered the Township to permit erection of the structures. Omnipoint cross appealed to the U.S. Court of Appeals for the Third Circuit from the denial of attorneys' fees. The Township and the Board appealed from the other aspects of Magistrate Judge Smith's Orders.

The Third Circuit reversed, holding that denial of the building permit did not have the effect of prohibiting the provision of wireless services in the Township in violation of the Telecommunications Act for the reason that the record established by Omnipoint failed to demonstrate a significant gap in service available to wireless telephone service users. The Third Circuit directed a remand to complete the record. In doing so, the Third Circuit followed its recent decisions in *Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3rd Cir. 1999) and *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469 (3rd Cir. 1999). Under the circumstances, the Third Circuit did not reach the Civil Rights Act claim.

From that determination, Omnipoint has now petitioned this Court for certiorari.

Due to the particularly fact-sensitive nature of the cases under the Telecommunications Act and the especially unique facts of this case, a brief review of the record available to the courts below is necessary. That record revealed the following.

On November 4, 1997, Omnipoint submitted to the Township an "application for building permit" to install

an antenna and associated electronic structures for wireless telephone service atop the roof of an apartment building located in the Township known as the Newtown Towers on West Chester Pike in the Newtown Square section of the Township. On review of the Application, the Building Inspector/Assistant Zoning Officer of the Township denied the Application for the reason that the building is located in an A-O (apartment-office) zoning district in which the requested use (i.e., erection of the antenna) is not a permitted use or accessory use in accordance with the Township's Zoning Ordinance. By letter dated November 14, 1997, Omnipoint was notified of the denial of the permit and of the availability of an appeal to the Board. The letter further advised that a zoning variance would be required to permit the structure.

Omnipoint took an appeal from the Zoning Officer's determination which was forwarded to the Township on or about December 15, 1997. No variance has ever been requested by Omnipoint. Extensive public hearings on the appeal were held before the Board on April 16, 1998, May 6, 1998, May 29, 1998, June 30, 1998 and July 16, 1998. On due consideration, the Board denied the appeal and so advised Omnipoint on August 31, 1998 by a written decision. The decision was followed by the Board's written findings of fact and conclusions of law issued on September 2, 1998.

The Newtown Towers proposed site of Omnipoint's antenna and related electronics is in a primarily residential neighborhood. The building is in the A-O zoning district, which under the zoning ordinance includes as "accessory uses" those uses which are "customarily incidental" to the permitted uses of apartment house and

service offices. Magistrate Judge Smith of the District Court below in his opinion acknowledged that the antenna was prohibited under the zoning ordinance and Omnipoint has never asserted to the contrary throughout these proceedings. Several locations within the Township other than the Newtown Towers site are available for erection of the antenna, including two light industrial zoning districts and a special use (SU2) district wherein a 500 foot tall radio tower (referred to by the parties in the proceedings of record as the "KISS 100 radio tower") is located. While the proceedings were ongoing on Omnipoint's request for a building permit, Omnipoint made a fainthearted effort to negotiate a lease at property owned by SAP America at one of these light industrial districts. The antenna would be permitted at any of these other locations under the zoning ordinance.

Ronald McHatton, the Building Inspector of the Township, conducted a test wherein he drove throughout the Township using wireless phones from several suppliers including Omnipoint and Sprint and found that he could receive and transmit clearly in all areas of the Township except to the west of Pennsylvania Route 252, a state highway which roughly bisects the Township from north to south and which intersects West Chester Pike (which runs east-west) well under a mile from the Newtown Towers site. In fact, Mr. McHatton used an Omnipoint phone in this test for about one month. The KISS 100 tower is located west of Route 252; Omnipoint's proposed site at the Newtown Towers is east of Route 252. The Township provided the testimony of an expert witness Bernard Nelson before the Zoning Hearing Board who testified as to the various means whereby alternate

sites for erection of the antenna and related electronics would provide adequate wireless service for Omnipoint without the necessity of establishing the antenna at the Newtown Towers site.

Significantly, the Newtown Towers site had previously been the subject of an application to erect an antenna by a competitor of Omnipoint, Comcast Metrophone. That permit was also denied. The denial was affirmed in proceedings appealed to the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania. *See AWACS, Inc. v. Zoning Hearing Board of Newtown Township*, 702 A.2d 604 (Pa. Cmwlth. Ct. 1997), *aff'd*, 559 Pa. 104, 739 A.2d 159 (1999).

In its decision, the Zoning Hearing Board had determined that Omnipoint was not entitled to the building permit inasmuch as erection of the antenna and related electronics atop the Newtown Towers did not constitute a permitted accessory use, reaffirming the decision of the Township's Building Inspector/Assistant Zoning Officer. Magistrate Judge Smith agreed in the District Court and Omnipoint has never argued to the contrary in these proceedings.

REASONS FOR DENYING THE WRIT

1. Introduction

The relevant statute is the Federal Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7), which provides in relevant part as follows:

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) [Omitted]

(iii) Any decision by a State or local government or instrumentality to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Part (c)(7) of the statute including the anti-discrimination provision and the "effect of prohibiting" provision is itself entitled "Preservation of local zoning authority". As Magistrate Judge Smith in the District Court recognized, citing the authorities on the subject, the Telecommunications Act "clearly acknowledges the right of local governments to exercise their land use authority over personal wireless services." *See, e.g., Virginia Metronet, Inc. v. Board of Supervisors*, 984 F. Supp. 966 (E.D. Va. 1998). *Cf. Omnipoint v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403 (3d Cir. 1999). The legislative history further makes this clear. *See* House Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 208, *reprinted in* 1996 *U.S. Code Cong. & Ad. News* 222 ("The conference agreement creates a new section . . . which prevents [FCC] preemption of local and State land use decisions over zoning and land use matters except in . . . limited circumstances . . . ."). Further, Magistrate Judge Smith in his opinion specifically found that the denial of the building permit was an appropriate exercise of that zoning authority by the Township in his agreement with the Township that the antenna was not a use or accessory use permitted under the Zoning Ordinance. Again, Omnipoint has never challenged this determination in these proceedings.

Similarly, Magistrate Judge Smith found also that the Township and the Zoning Hearing Board of the Township did not, in the words of the statute, "unreasonably discriminate" against Omnipoint. The evidence of record reveals that several other providers such as Sprint have facilities in the Township, including those already on the KISS 100 tower. Certainly, in denying the building permit, the Township and Zoning Hearing Board of the Township

treated Omnipoint precisely the same, as recognized by Magistrate Judge Smith, as Comcast had been treated on its prior application to install wireless antenna facilities at the same site. *See AWACS, Inc. v. Zoning Hearing Board of Newtown Township*, 702 A.2d 604 (Pa. Cmwlth. Ct. 1997), *aff'd*, 559 Pa. 104, 739 A.2d 159 (1999). The decisions under the Telecommunications Act nationwide recognize the fact that, other than in certain clear, *per se* cases, case-by-case determinations are necessary in cases wherein wireless providers allege an "effective prohibition" of wireless services actionable under the statute. This case in particular, wherein the Third Circuit directed a remand for Omnipoint to develop a complete record in support of its contentions, is inappropriate for certiorari.

Omnipoint's claim that there is a conflict among the circuits is in reality a conflict of its own design. The circuit court decisions can indeed be reconciled and, further, the need for case by case determinations recognized in virtually all the decisions addressing Telecommunications Act claims limits the present usefulness of any global statement in this developing area.

The Third Circuit's requirement that there be a gap in wireless service prior to any finding that service was effectively prohibited by municipal zoning authority duly protects the interest in retaining local autonomy in zoning matters. The legislative history makes clear that this was a key congressional concern. Omnipoint would add to the provision of prohibition a carrier-specific requirement that "service [by a particular carrier] was effectively prohibited", an inclusion in the language of the statute that is unjustified by the legislative history. Omnipoint's

complaint of unfairness ignores the anti-discrimination provision in the Act.

Although Omnipoint has not directly addressed the Civil Rights Act claim in its Petition, it argues at footnote six of its Petition that that question should be addressed if Certiorari is granted. Respondents disagree with this contention, and note that the Court of Appeals in this case declined to decide this issue. (*See Omnipoint Communications Enterprises, L.P. v. Newtown Township*, 219 F.3d 240, 245 (3rd Cir. 2000)). In addition, this issue should not be addressed by this Court, as it has not yet been addressed by any of the Circuit Courts of Appeals (with the exception of the decision by the Eleventh Circuit in *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), which was later vacated (*See* 2000 W.L. 1210663 (11th Cir. August 25, 2000)).

2. There is no real conflict among the circuit court of appeals decisions cited by omnipoint in its petition for writ of certiorari.

There is in fact no conflict between the Third Circuit's formulation of an applicable standard and that employed by the Second Circuit in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999). Indeed, the Second Circuit adopted a standard identical to that applied by the Third Circuit below: "We hold only that the Act's ban on prohibiting personal wireless service precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land lines." 176 F.3d at 641. The reference to "significant gap"

to be filled by "least intrusive means" is, of course, merely a transposition of the two part standard adopted by the Third Circuit below. At the same time the Second Circuit in *Sprint Spectrum*, contrary to Omnipoint's assertions, in fact recognized what Omnipoint refers to as an "all carriers" requirement in its recognition that "once an area is sufficiently serviced by a wireless provider, the right to deny applications becomes broader." 176 F.3d at 643. A conflict, therefore, compelling intervention by this Court at this time is hardly raised when *Willoth* and the Third Circuit's opinion below are compared.

As further evidence of a purported conflict among the circuits, Omnipoint cites only two decisions of the Fourth Circuit and a single decision of the First Circuit. The Fourth Circuit decision in *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998) and the First Circuit decision in *Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc.*, 173 F.3d 9 (1st Cir. 1999) can similarly be reconciled with the approach taken by the Third Circuit and the Second Circuit in that the First and Fourth Circuit decisions represent essentially *per se* determinations in which whether by regulation or by practice there has been a direct prohibition of service. It is only in more subtle instances of alleged prohibition of wireless service not memorialized in regulations nor institutionalized by practice that a test such as that espoused by the Third and Second Circuits need be applicable. Indeed, in neither *Virginia Beach* nor in *Town of Amherst* is there any indication that service was being provided adequately or at all by another provider rendering those cases readily distinguishable on the merits.

To like effect, the decision of the Fourth Circuit speaking more recently than *Virginia Beach* in *360 degrees in Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), adopts a *per se* test hinted at by the Fourth Circuit in its earlier *Virginia Beach* decision. Even Omnipoint in its Petition for Writ of Certiorari makes clear that any rejection of the approach taken by the Second and Third Circuits in *360 degrees* represented rather a view less likely to find an effective prohibition of service than that under the tests established by the Second and Third Circuits. *See* Petition for Writ of Certiorari of Omnipoint at page 10 n.5.

Thus, there is indeed no conflict among the circuits. The Second and Third Circuit have adopted an identical test which, it is submitted, is wholly justified under the statute. The First and Fourth Circuits have addressed factually distinguishable circumstances amenable to a *per se* test applicable without the need for any reference to whether or not there is a gap in coverage but instead representing situations of hostility to all carriers either by regulation or in the practice of a municipal zoning authority.

The district court cases cited by Omnipoint serve no further purpose to demonstrate a conflict among the circuits. This Court's Rule 10(a) consideration governing review on certiorari addresses only conflicts among the circuits and the district courts' decisions are not germane to this Court's exercise of its discretion in ruling on a petition for certiorari. Moreover, the district court decisions cited by Omnipoint show no conflict.

Omnipoint Communications MB Operations, LLC v. Town of Lincoln, No. Civ. A. 99-11012, 2000 WL 1089511 (D. Mass. Aug. 2, 2000), *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190 (D.R.I. 2000) and *Industrial Communications & Elec., Inc. v. Town of Falmouth*, No. 98-397, 2000 WL 761001 (D. Me. May 9, 2000) are, of course, all decisions rendered by district courts within the First Circuit which apply that Circuit's *per se* test under clear circumstances such as those addressed by the First Circuit in *Town of Amherst* and in accordance with the rule of that circuit announced in *Town of Amherst*.

The decision of the District Court for the Western District of Wisconsin in the Seventh Circuit in *APT Minneapolis, Inc. v. Eau Claire County*, 80 F. Supp. 2d 1014 (W.D. Wisc. 1999) followed *Town of Amherst* in another *per se* type of case. As such, the language cited by Omnipoint and attributed to that District Court at page 10 of Omnipoint's Petition for Writ of Certiorari is dictum.

Sprint Spectrum, L.P. v. Mills, 65 F. Supp. 2d 148 (S.D.N.Y. 1999) of the Southern District of New York in the Second Circuit involved another *per se* case wherein the court found a prohibition of service in a general rule that there could be no lease to erect a telecommunications facility where state law purportedly prohibited the lease of public property solely for the benefit of a private party.

Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County, 59 F. Supp. 2d 1101 (D. Colo. 1999) by the District of Colorado in the Tenth Circuit, contrary to Omnipoint's assertion at page 11 in its Petition, does not address or even discuss any so-called "all carriers" requirement. To the same effect is *Smart SMR of New York*,

Inc. v. Zoning Comm'n of Stratford, 995 F. Supp. 52 (D. Conn.1998) by the District of Connecticut in the Second Circuit. Again, the Connecticut District Court applied a *per se* rule as in *Town of Amherst* and again stated the need to examine the cases on a case-by-case basis without speaking to any "all carriers" requirement.

Sprint Spectrum, L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997) of the Northern District of Alabama in the Eleventh Circuit can also be characterized as a *per se* case in that the court therein found that all carriers were being prohibited from introducing new, digital technology into the locality. Finally, another *per se* case is *Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe*, 957 F. Supp. 1230 (D.N.M. 1997) wherein the District of New Mexico in the Tenth Circuit found that the "record does not support a legitimate basis for the denial" and, again, found that all carriers were being denied the opportunity to introduce new technology to the area.

It requires a strained reading of the cases to determine that there is any present conflict among the circuits which must now be resolved by this Court.

3. The Third Circuit's decision is not anti-competitive.

Omnipoint argues that what it characterizes as the Third Circuit's "all carriers" rule will create a monopoly by the first carrier to establish service in an area. Omnipoint does not argue, however, that it or other carriers are in any way precluded from establishing compatible technologies that could permit transmission of wireless communications by several carriers from a connection site

established by one of them. Any ruling that would encourage a standardized protocol among what are now competing and incompatible technologies should be encouraged.

At the same time, however, it hardly follows from any "all carriers" requirement that the first carrier to establish a transmission site in a locality will have a monopoly there. Omnipoint simply failed in the courts below to make a record that Newtown Towers was the only site available for its antenna. Without such a record, Omnipoint cannot really justify involving this Court's certiorari jurisdiction. The sole effect of the Third Circuit's decision is that the statute must be read for what it says. For there to be an effective prohibition of wireless service, that prohibition must be against service generally by all carriers and not by a single carrier by denial of a building permit at a location clearly not so zoned. Contrary to the logical conclusion from Omnipoint's arguments, the statute requires that "regulation of the placement, construction and modification of personal wireless service facilities by any state or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services" generally. The statute does not purport to limit local governmental regulation with "the effect of prohibiting the provision of personal wireless services" *by a particular carrier*. In the event that any municipal authority prohibits service by particular carrier *not authorized under its zoning ordinance or other legal authority*, Omnipoint and other carriers have ready reference to the protections of the anti-discrimination provisions set forth in the same section of the statute.

4. The facts of this case present a poor and incomplete record for a global statement of standards to be adopted by the court.

This case, again, represents a factually poor circumstance for Omnipoint's challenge. In this case, Omnipoint has never argued that it was discriminated against vis-a-vis other carriers and in this case there was abundant evidence of record that other sites are available for erection of Omnipoint's proposed facility.

Omnipoint's engineers testified at the Board that they did not consider alternate sites and they certainly did not do so prior to making an application for the building permit or prior to the appeal proceedings before the Zoning Hearing Board. They did not do studies as to the light industrial district referred to in the record as the deBotton property in the western reaches of the Township, and apparently never did as to the light industrial district occupied by SAP America. There was a great deal of evidence presented to the Zoning Hearing Board indicating availability of other sites for location of the antenna and related electronics in the Township together with other technical improvements such as stronger transmitters or the use of repeaters which could suit Omnipoint's needs.

The evidence was clear that under the zoning ordinance, erection of the antenna and related structures at the Newtown Towers site was impermissible. Magistrate Judge Smith so held. It also appears clear in the record that prior to the proceedings in the Zoning Hearing

Board below Omnipoint had early on settled on the Newtown Towers site as the "optimal" location. In the proceedings before the Board, Omnipoint's witnesses candidly acknowledged that that location was the only one they scouted.

Furthermore, Omnipoint's insistence on the Newtown Towers site was dictated by factors if not within its control certainly permitted by Omnipoint to exist, *i.e.*, the nature of its equipment and the location of its other antenna facilities outside of Newtown Township. For instance, there was testimony before the Board regarding erection of an antenna in Marple Township, a municipality adjoining Newtown to the east. The Marple site is far to the easterly end of that Township, close to Haverford Township (the township to the east of Marple) at the intersection of Lawrence Road and West Chester Pike near Interstate 476. Had, for instance, Omnipoint chosen to pursue an antenna site at a more westerly point in Marple Township closer to the Newtown Township border not only would the Newtown Towers site not have been essential for "optimal" coverage but, further, an antenna might not have even been necessary in Newtown Township at all to fill any gap between a Marple antenna and Omnipoint's proposed site for an antenna in Edgmont Township adjoining Newtown Township to the west. Perhaps even another site in Newtown would have satisfied Omnipoint. Newtown Towers was hardly the least intrusive alternative. Omnipoint has not made a record; hence, the Third Circuit's remand.

The problem that Omnipoint creates is obvious. Newtown, like other municipalities, must establish its zoning districts and must provide zoning allowing such antennas

in appropriate parts of the Township before Omnipoint, Sprint or any other provider appears at its Township offices with an application for a building permit. Newtown Township in good faith zoned to allow antennas in three different parts of the Township. Omnipoint, however, now appears on the scene claiming that it must, because of the limits of its own equipment and because of other antenna locations used by it, erect an antenna in a wholly different part of the Township not zoned to permit an antenna. Omnipoint now claims that the Township must allow Omnipoint's chosen site or will be deemed to have "prohibited" wireless service in the Township. Unfortunately for municipalities, Omnipoint's chosen equipment and chosen antenna locations mandate the location; a Township, however, has no "crystal ball" with which to predict how to draw its zoning classifications based on a wireless phone provider's desires and under Omnipoint's view will have its zoning ordinance ignored if it is not clairvoyant.

Even assuming that availabilities of antenna sites within Newtown Township were reasonably limited by Omnipoint's antenna sites in adjoining townships such as Edgmont to the west and Marple to the east there is substantial evidence in the record showing that even the Newtown Towers site was not essential.

Bernard Nelson, an expert witness retained by the Township at its expense in the proceedings before the Board, testified at length about the availability of the so-called KISS 100 tower as a satisfactory site for an antenna facility that could meet Omnipoint's needs even given the circumstances of the location of antennas in adjoining townships.

There was further the evidence provided by the drive through survey by Building Inspector Mr. McHatton of the Township regarding his success using not only a Sprint phone but also an Omnipoint wireless telephone throughout the Township, finding difficulty only west of Pennsylvania Route 252. This drive-through survey, it must be remembered, was performed without Omnipoint establishing any antenna facility at the Newtown Towers or elsewhere in the Township and belied Omnipoint's proffered evidence to the effect that the Newtown Towers site was necessary to enable wireless transmissions in the easterly portion of the Township, *i.e.*, east of Route 252.

There was further the evidence in the record establishing the availability of other alternative sites for installation of the antenna and associated electronics in addition to the KISS 100 tower. There are, as established in the record before the Board, two light industrial districts, one occupied by SAP America and another being the so-called deBotton tract in the westerly section of the Township. There was substantial evidence these sites were available for and suitable for installation of an antenna.

Thus, with alternative sites established in the record below, Omnipoint's argument that there was only a single site available for installation of the antenna at the SAP America property is unsupported by the record. Further, the evidence is clear that Omnipoint took no action whatsoever to attempt to deal with the owner of the SAP America property until after the proceedings before the Board had begun. In fact, what little efforts were taken by Omnipoint to attempt to negotiate an antenna site lease at the SAP America property included apparently only a

half-hearted effort which included an offer of lease payments of only one-half of the amount theretofore agreed to be paid by Omnipoint to the owner of the Newtown Towers.

The argument that alleged refusal of a single landowner to lease space for an antenna was addressed by the Third Circuit's reasoned opinion in *APT Pittsburgh, supra:*

> "Pennsylvania's rule against exclusionary zoning does not impose upon a township the duty to assure that all providers, regardless of the systems they have chosen to construct, will have a suitable site for a functioning tower within the township. To be exclusionary, the ordinance must effectively foreclose not only [the applicant's] use, but all use."

The fact of other providers maintaining antennas at the KISS 100 tower as well as Mr. McHatton's success in his drive-through wireless test through the Township belies any contrary argument by Omnipoint. The mere "negative response" by SAP America should rate no more than was the case in *APT Pittsburgh*. An offer of only one-half of what was paid to the owner of the Newtown Towers hardly demonstrates the "economic infeasibility" reasonably required by the Third Circuit in *APT Pittsburgh*.

5. Omnipoint's arguments are not bolstered by the recent legislation cited in its petition.

Pointing to the Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, Omnipoint

attempts to portray the Respondents' good faith enforcement of valid zoning laws as contrary to the will of Congress if not a danger to the public. A reading of that statute, however, reveals little support for Omnipoint's position. What this Act did, as described in President Clinton's Signing Statement, bore little relation to any dissatisfaction with any "all carriers" requirement:

> "The legislation I am signing today will improve emergency wireless communications in several ways. First, it will make 9-1-1 the universal number. . . . Second, it will encourage statewide coordination of the efforts of public safety and law enforcement officials to protect our citizens and save lives. Finally, it will increase private sector investment in emergency wireless services by providing wireless companies with the same level of liability protection that 'wireline' telecommunications companies have."

Statement by President William J. Clinton on signing S. 800, 35 Weekly Compilation of Presidential Documents (10/26/99).

Indeed, the Committee reports on the statute indicate that the main purpose of the bill was to standardize the use of 9-1-1 for emergency calls, a purpose which bears no relation to Omnipoint's arguments in this case.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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